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No. 07-1559

Supreme Court, U.S.
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In the Supreme Court of the United States

M.M., BY AND THROUGH HER PARENT, L.R.,
Petitioner,

v.

SPECIAL SCHOOL DISTRICT NO. 1,
MINNEAPOLIS,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition where the Eighth Circuit Court of Appeals' Opinion does not conflict with this Court's decision in *Schaffer v. Weast ex rel. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005) or that of any other court of appeals.

2. Whether Petitioners have presented compelling reasons to grant the Petition where Petitioner claims that the Opinion of the Eighth Circuit Court of Appeals conflicts with the Individuals with Disabilities Education Improvement Act.

3. Whether Petitioners have presented compelling reasons to grant the Petition where Petitioners claim that the Eighth Circuit did not apply the proper standard of review.

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INTRODUCTION

Petitioners have presented no compelling reason for the granting of their Petition for a Writ of *Certiorari* ("Petition"). Specifically, Petitioners fail to demonstrate that the Eight Circuit's Opinion ("Opinion") in *M.M ex rel. L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455 (8th Cir.), *reh'g and reh'g en banc denied*, (2008)[1] is in conflict with the decision of any other court of appeals as no other court of appeals has issued a contrary opinion.

In addition, Petitioners fail to demonstrate that the Opinion is in conflict with this Court's holding in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49,126 S.Ct. 528 (2005). In that case, this Court held that the burden of persuasion in a due process hearing under the Individuals with Disabilities Education Improvement Act ("IDEA") lies on the party seeking relief. The Eighth Circuit's Opinion applied the holding of *Schaffer* and does not conflict with that holding.

Petitioners and their *amici* also fail to show a compelling reason for granting *certiorari* review based on their argument that the Eight Circuit's Opinion conflicts with IDEA and this Court's prior decisions interpreting IDEA as an act of cooperative federalism. *See e.g., Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 183, 102 S.Ct. 3034 (1982).

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[1] The Eighth Circuit's Opinion is its second determination that the burden of proof is properly placed on the moving party in a Minnesota case involving a due process hearing under the Individuals with Disabilities Improvement Education Act. *See Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010 n.3 (8th Cir. 2006)

Petitioners argue that a state may provide educational benefits that exceed the federal minimums established by IDEA. (Pet. at 4) And that assigning the burden of proof to the school district in every instance will provide a student with additional educational benefit. (*See* Pet. at 8; *Amicus* Brief of State of Minnesota at 7-9) The argument confuses the *Rowley* Court's deference to school officials on methodological matters with the burden of proof. This Court addressed this argument squarely in *Schaffer* and found that the placement of the burden of persuasion on school districts will not further IDEA's purposes but instead may very likely frustrate those goals. *See Schaffer,* 546 U.S. at 535.

Petitioners have failed to carry their burden of demonstrating compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

This case arises pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §1400 *et seq.* (IDEA) Petitioners seek review of the Eighth Circuit Court of Appeals' Opinion that held that the burden of proof was properly placed on the moving party. *M.M. by and through her parent, L.R. v. Special Sch. Dist. No.1,* 512 F.3d 455, 459 (8th Cir. 2008).

M.M was a student in the Minneapolis Public Schools, Special School District No. 1 ("District"). She received special education services in the District. Her parent requested an administrative hearing asserting that the District had failed to provide M.M. with a free appropriate public education (FAPE). The

District counterclaimed asserting that the student could not receive FAPE in the regular education environment and seeking an order that the student be educated in a Setting III special education program.

The Administrative Law Judge (ALJ) ruled in the District's favor and ordered that the student attend a Setting III program. She also ordered that the student had not received FAPE for two school years resulting in an award of compensatory education. (Pet. App. 150) The federal District Court affirmed the ALJ's determination and awarded attorneys' fees to L.R. but reduced the award of compensatory education. (Pet. App. 106)

The District appealed and the Eighth Circuit found that the burden of proof had been improperly assigned. *M.M.*, 512 F.3d at 459; *see also Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, n.3 (8th Cir.2006) (Minnesota case). The Court further reversed the ALJ's award of compensatory education and attorneys' fees on the merits finding that M.M had been offered FAPE. *M.M* at 465-66.

REASONS FOR DENYING THE WRIT

There is no compelling reason to grant *certiorari* in this case. Review by this Court on a writ of *certiorari* is not a matter of right but of judicial discretion. *See* S. Ct. R. 10. The Rule states in pertinent part:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

S.Ct. R. 10. Petitioners have not met their burden of showing some compelling reason to grant *certiorari*. The Eighth Circuit's Opinion is not in conflict with that of another court of appeals or of this Court. Nor is the Opinion contrary to the cooperative federalism that is part of the IDEA. Finally, Petitioners

argument that the Eighth Circuit did not state or apply the correct standard of review does not compel a grant of *certiorari* review.

I. NO CONFLICT EXISTS AMONG THE COURTS OF APPEAL.

Absent a conflict among the courts of appeal or a conflict with a decision of the state court of last resort, no important reason for *certiorari* review exists. *See* S. Ct. R. 10(a).

> A principal purpose for which we use our certiorari jurisdiction... is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. *See* this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours.

Braxton v. U.S., 500 U.S. 344, 347-348, 111 S.Ct. 1854, 1857 (1991); *Davis as Next Friend of LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638; 119 S.Ct. 1661, 1669 (1999) (*certiorari* granted to resolve split in circuits) *Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73; 119 S.Ct. 992, 997 (1999).

No conflict exists among the circuit courts in this instance. Instead, every court of appeals that has decided the issue of the assignment of the burden of proof in an IDEA case has applied the general default rule as did this Court in *Schaffer ex rel. Schafer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). *See e.g., Sherman v. Mamroneck Union Sch. Dist.*, 340 F.3d 87 (2nd Cir. 2003); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384 (3rd Cir. 2006); *Fairfax County School Bd. v. Knight*, 261 Fed. Appx. 606, 608 (4th Cir. 2008); *Alamo Heights Independent School Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir.1986); *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006); *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007); *Brown v. Bartholomew Consol. School Corp.*, 442 F.3d 588, 594 (7th Cir. 2006); *Stringer v. St. James R-1 School Dist.*, 446 F.3d 799, 803 (8th Cir. 2006); *West Platte R-II Sch.Dist. v. Wilson*, 439 F.3d 782, 784 (8th Cir. 2006); *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett* 440 F.3d 1007, n.7 (8th Cir. 2006); *M.M. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 459 (8th Cir. 2008); *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 939, n.6 (9th Cir. 2007); *L.G. ex rel. B.G. v. School Bd. of Palm Beach County*, 255 Fed.Appx. 360, 366 (11th Cir. 2007)(not selected for publication in Fed. Rptr.)

Petitioner's correctly point out that no court of appeals has decided the issue where the state had a statute assigning the burden to the school district in every situation. However, just like the State of Maryland in *Schaffer*, many of the states had a body of administrative law or prior regulations assigning the burden of proof. *See e.g., W.Va. Code St.R.t.126, series 16, App. A. Ch.11, §3, 92 Neb. Admin. Code*

§55-007.01A (2002). Given that no conflict exists among the circuit courts of appeal, there is no valid reason for this Court to grant *certiorari* review in this matter.

II. THE EIGHTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR IDEA.

A. The Opinion is Congruent with Prior Decisions of this Court.

In *Schaffer,* this Court examined the question of which party bears the burden of proof in a due process hearing under the IDEA. *Schaffer,* 546 U.S. at 51. At issue in *Schaffer* was a Maryland student's challenge to a proposed IEP. *Id.* at 54. Maryland had no statute or regulation assigning the burden of proof although it had rules of administrative procedure and a body of administrative case law. *Id.* at 71 (Breyer, J. dissenting) This Court determined that the burden should be, as traditionally placed, on the party who challenged the status quo. *Id.* at 54. The *Schaffer* Court correctly determined that the assignment of the burden of proof does not afford students or their parents additional rights – those rights are specifically enumerated in the Act and include the ability to examine the student's records and the opportunity to have an independent evaluation by an expert at the district's expense, among other important rights. *Id.* at 60-61 (*citations to IDEA omitted*). The decision in *M.M.* is not in conflict with *Schaffer* but instead is in full concert with that decision.

Petitioners also assert that the Eighth Circuit's Opinion conflicts with the cooperative federalism provisions of the IDEA and this Court's interpretation of those provisions in *Rowley*. The Opinion does not conflict with the IDEA or *Rowley* but instead furthers the purpose of the IDEA to ensure that students with disabilities receive an appropriate education.

B. The Opinion is Congruent with the Purposes of the IDEA as Interpreted by *Rowley*.

Petitioners argue that the Eighth Circuit's Opinion is in conflict with Congressional intent to incorporate principles of cooperative federalism into the IDEA. (Pet. at 5-6) Under IDEA, Congress left to the states decisions about educational methods or practices. States must establish educational policies and practices for children with disabilities. *See* 20 U.S.C. §1401(9)(B) (FAPE means specialized instruction that meets state standards).

> ...the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction of each child.

Rowley, 458 U.S. at 189. (*emphasis in original*)

States may also choose to offer more than the "appropriate education" or FAPE that is required by IDEA. *Blackmon ex rel. Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648,658-59 (8th Cir. 1999).

However, Petitioners confuse the IDEA's reservation of educational methodologies to the states with the assignment of the burden of proof. The deference found in IDEA and referred to in *Rowley* is in reference to a state's choice of methods to educate students with disabilities. The *procedures* that provide specialized instruction are left to the states to decide. *See Rowley*, 458 U.S. at 206. Although IDEA provides for a great deal of parental involvement in the student's education, the choice of educational methods is entirely one for the educational professionals to make. IDEA requires an "interactive process." The choice of instructional methods is left to the school district. *Gill v. Columbia*, 217 F.3d 1027, 1037 (8th Cir. 2000).

The question of whether a state may override the ordinary default rule was clearly acknowledged by this Court in *Schaffer*. "Finally, respondents and some States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations *purporting* to do so, at least under some circumstances." *Shaffer*, 546 U.S. at 537. *(citations omitted)(emphasis added).* In *Shaffer*, this Court addressed each of the arguments that Petitioners make here. It found that assignment of the burden was not an educational practice, nor was it a procedural right granted by the federal law.

> Assigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs and presenting their evidence. But IDEA is silent about whether marginal dollars should be allocated to litigation...or educational services.

Schaffer, 546 U.S. at 59.

This Court also addressed the issue of the fairness of placing the burden of persuasion on a parent who has a right to participate in her child's education in a meaningful way. "School districts have a 'natural advantage' in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and share information with them." *Id.* at 60 (*citations omitted*). As this Court observed, those protections are specifically enumerated in IDEA and include the ability for parents to hire an expert at district expense. *See id.* at 60-61.

IDEA reserves to the states decisions about how to teach reading or whether to use a particular curriculum or behavioral program for children with special needs. Petitioners' argument that "educational methods" or "procedures" includes the assignment of the burden of proof in an administrative hearing that is required by federal law and whose result is appealable to the federal court was not persuasive in *Schaffer* and is not persuasive here.

The *Schaffer* decision determined that the ordinary default rule applied to a due process hearing because IDEA was silent on the assignment of the burden and no compelling reason was provided to deviate from that rule. Thus, only if a state can override the federal law would Minnesota be able to devise its own two-part burden of proof. Petitioners and the *amici* raise the same arguments that were raised in *Schaffer*. Because this Court fully addressed the precise arguments in *Schaffer* there is no compelling reason to grant review at this time. The Eighth Circuit's Opinion does not conflict with

the purposes of IDEA, or this Court's interpretations of the principles under IDEA. Therefore, no compelling reason for a grant of *certiorari* has been shown.

C. Federal Law Preempts State Law.

Finally, it is well settled that federal law may preempt state law pursuant to the supremacy clause of the United States Constitution. *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190 (1983). Absent express language or a preemptive clause, the Court looks to Congressional intent. Even where Congress did not entirely displace state law, as is the case under IDEA, state law will be preempted by the federal act where it conflicts with the obvious federal purpose. *Motor Vehicle Mfrs. Assoc. of the United States, Inc. v. Abrams*, 899 F.2d 1315, 1318 (2d Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122 (1991). Such a conflict arises when compliance with both federal and state regulations is a physical impossibility. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, *reh'g denied*, 373 U.S. 132 (1963). Or a conflict arises where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941).

Minnesota law placed the burden of proof on the school district. Minn. Stat. §125A.091, subd. 16. If the district failed to prove that it had provided FAPE and the parents sought reimbursement of private school tuition, the burden of proof shifted to the parents to show that the private school was

appropriate. *Id.* At least in theory, the latter portion of the Minnesota act could be implemented without violating the federal law. *See P.K.W.G. ex rel. Gilmore v. Indep. Sch. Dist. No. 1*, Slip Copy, 2008 WL 2405818 (D. Minn. 2008) (finding that federal law preempts to the extent it places burden always on district.)

In this case, the determination that Congress intended the general default rule to apply has already been made. *See Schaffer* at 57-58. The clear intent of Congress has been to reduce the administrative and litigation costs associated with IDEA. *See* 20 U.S.C. §1415(e) (1997 amendment adding mediation); 20 U.S.C. §1415(f) (1)(B) (2004 amendment adding resolution session before hearing); *see also Schaffer* at 59. That purpose would be thwarted by placing the burden on the school at all times because the school district would be forced to put more time and resources into "preparing IEPs and presenting their evidence." *Id.* at 58. Therefore, the State law that purported to place the burden on the school district in all situations must yield to the federal purpose.

III. FAILURE TO CERTIFY DOES NOT COMPEL A GRANT OF REVIEW

The *amicus* State of Minnesota argues that it did not receive notice from the Eighth Circuit Court of Appeals as required by 28 U.S.C.§2403(b). The statute provides:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any

> statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. §2403(b). There is a question as to whether 28 U.S.C. §2803(b) applies in a case like this one where the only constitutional challenge is one of supremacy. Where the constitutional challenge is solely an allegation that the state statute is in conflict with a federal statute, the statutory requirement may not apply. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986), *probable jurisdiction noted*, 479 U.S. 810, 811; 107 S. Ct. 258 (1986) *rev'd on other grounds*, 481 U.S. 69, 107 S. Ct. 1637 (1987).

Even if the Eighth Circuit or the District Court of Minnesota should have certified the constitutional challenge to the Minnesota Attorney General, the lack of certification did not deprive the Eighth Circuit Court of Appeals of jurisdiction. "Certification is a duty of the court that should not be ignored, even if the claim is obviously frivolous or may be disposed of on other grounds." *Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985). "However, failure to comply does not deprive the

district court or the court of appeals of jurisdiction." *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1075 (8th Cir. 1992) (order for certification at the close of appeal). *Cf. Strong v. Board of Educ.*, 902 F.2d 208, 213 n. 3 (2d Cir. 1990) (post-appeal certification; constitutional claim was not reached on appeal), *cert. denied*, 498 U.S. 897, 111 S.Ct. 250 (1990). Even the *amicus* does not argue that the failure to certify is a sufficient ground to grant *certiorari*. The Petition should be dismissed.

IV. FACTUAL ERRORS DO NOT COMPEL GRANTING OF *CERTIORARI*.

Certiorari is rarely granted when the claimed error is an erroneous factual finding. S.Ct. R. 10.

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.

Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193; *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 456 (U.S. 1951).

Petitioners argue that *certiorari* should be granted because the Eighth Circuit did not cite a standard of review and misapplied the standard of review that is required in IDEA cases.[2] The Circuit Court did in fact cite and apply the correct standard. The Eighth Circuit's Opinion states: "[r]eviewing the district court's ultimate determination that M.M. did not receive a FAPE *de novo*, we reverse." *M.M.*, 512 F.3d at 458, 461. The Circuit Court did apply the correct standard and following a *de novo* review of the record, it found that the School District's proposed educational placement was appropriate.

Petitioners assert that the Eighth Circuit made several factual errors. Because alleged factual errors will rarely trigger the type of compelling reason required to grant *certiorari* review, we address them only briefly. In one instance, Petitioners claim that the Court of Appeals misapplied federal law regarding the impact of more than ten days of suspension in a school year for a student with disabilities. (Pet. at 16-17) In fact, the Court determined that "[b]ecause M.M. had been suspended for more than ten days, the District completed a Functional Behavior Assessment... as required by the federal law."(*citations omitted*) (Pet. A-11) The Court went on to specifically apply the federal law and the Department of Education

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[2] We disagree with Petitioners recitation of the procedural posture of the case. (Pet. at 2-3)It is correctly stated by the Eighth Circuit Court of Appeals. (Pet.A-3)

regulations (Pet. App.16, 17). The Eighth Circuit found that M.M was suspended for short periods of less than ten days because the District had no choice but to maintain her in the "stay put" or last agreed upon placement. (*Id.*) The "stay put" program was not appropriate for M.M. and her behaviors continued to escalate without the special education support that was ultimately determined necessary for her success in school. Without the ability to provide the appropriate special education setting, the School District was forced to suspend M.M. for the more serious incidents of aggression or her violation of the weapons policy. (Pet. App.16-17). The Circuit Court applied the correct legal standard. The Petitioners' disagreement with the result is not grounds for the granting of *certiorari*.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Respondent therefore, respectfully requests that the Court deny the Petition.

Respectfully submitted,

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